No. 86-561

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE F. GRODE,
INSURANCE COMMISSIONER OF THE
COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION,
a Texas Reciprocal Interinsurance Exchange,
USAA CASUALTY INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
USAA ANNUITY AND LIFE INSURANCE COMPANY,
a Texas Stock Insurance Company,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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~~MOTION FOR LEAVE TO FILE BRIEF AND~~ BRIEF OF PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF PENNSYLVANIA ASSOCIATION OF INDEPENDENT INSURANCE AGENTS, JOHN M. ULRICH, JR., PROFESSIONAL INSURANCE AGENTS ASSOCIATION OF PENNSYLVANIA, MARYLAND AND DELAWARE, INC., CHARLES P. LEACH, JR., PENNSYLVANIA ASSOCIATION OF LIFE UNDERWRITERS AND HAROLD E. ALEXANDER

Pursuant to Rule 36 of the Rules of the Court, the

amici curiae seek leave to file the attached *amicus* brief in support of the petition for certiorari filed by George F. Grode, the Insurance Commissioner for the Commonwealth of Pennsylvania.

The institutional *amici* are organizations representing insurance agents who are licensed by the Pennsylvania Insurance Department and who sell insurance in Pennsylvania. The individual *amici* are themselves insurance agents licensed in Pennsylvania who sell insurance in that state.

The Pennsylvania Association of Independent Insurance Agents is composed of 1,099 independent insurance agents who are licensed to solicit fire, surety and casualty insurance contracts for insurance companies authorized to do business in Pennsylvania. John M. Ulrich, Jr., is a member of the Pennsylvania Association of Independent Insurance Agents licensed to sell fire, surety and casualty insurance in Pennsylvania.

The Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., represents 3,133 members who are licensed to sell fire, surety and casualty insurance contracts for insurance companies authorized to conduct business in Pennsylvania. Charles P. Leach, Jr. is a member of the Professional Insurance Agents Association of Pennsylvania, Maryland and Delaware, Inc., who sells fire, surety and casualty insurance in Pennsylvania.

The Pennsylvania Association of Life Underwriters is composed of 45 local associations that, in turn, represent 6,490 members who are licensed to sell life, accident, health and annuity insurance in Pennsylvania. Harold E. Alexander is a member of the Penn-

sylvania Association of Life Underwriters who sells life, accident, health and annuity insurance in Pennsylvania.

The *amici* have participated actively in this case by filing *amicus* briefs both in the United States District Court for the Middle District of Pennsylvania and in the United States Court of Appeals for the Third Circuit. In addition, the *amici* are intervenors in the administrative proceeding before the Insurance Commissioner of the Commonwealth of Pennsylvania that is the subject matter of this litigation. As intervenors in that proceeding, the *amici* have a particular interest in asserting their view that the federal courts should abstain from disrupting this state administrative process.

In addition, the *amici*, as persons and entities representing insurance agents in Pennsylvania, have a special interest in the basic subject-matter of this litigation, which concerns the ability of a lending institution to sell insurance to banking customers and to other persons. The *amici* have traditionally opposed the entry of banks and similar financial institutions into the insurance business and they will be directly affected by the eventual outcome of this litigation and the state administrative proceeding.

The parties, by letters dated November 25 and 26, 1986, have consented to the filing of the attached *amicus* brief.* Such filing will not delay the hearing in this case, but will, we believe, assist the Court in assessing crucially important issues.

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* The letters of consent have been lodged with the Clerk of the Court.

CONCLUSION

For the foregoing reasons, the Court should grant leave to file the attached brief *amicus curiae.*

Respectfully submitted,

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether refusal by a federal court to abstain from jurisdiction, under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), on the sole basis that a state administrative tribunal has no power to address constitutional claims comports with principles of federalism and with this Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, — U.S. ___, 106 S.Ct. 2718 (1986).

2. Whether the exercise of a federal court's equitable discretion to abstain from jurisdiction is appropriate where a state administrative proceeding is considering a difficult and unsettled issue of state law that, if resolved in favor of the regulated entity, would eliminate the need for adjudication of that entity's constitutional claims and where the subject matter of regulation—the business of selling insurance—has long been recognized to be important to the states.

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INTRODUCTION

This case concerns the ability of the Commonwealth of Pennsylvania to regulate the activities of a state-licensed insurance company through administrative and judicial procedures that provide the insurance company with ample opportunity to proffer its view of the scope of state regulation and the validity, under the United States Constitution, of that regulation. The Third Circuit refused to abstain from the exercise of federal jurisdiction over federal constitutional challenges to the state proceeding. The court of appeals decision represents an important -- and erroneous -- view of abstention. If left to stand, it would, as a practical matter, impede the ability of states across the nation to protect consumer interests through the regulation of state-licensed insurance companies.

INTEREST OF THE AMICI

The interest of the *amici* is set forth in the motion for leave to file this brief.

STATEMENT OF THE CASE

1. The respondent United Services Automobile Association ("USAA"), a Texas reciprocal interinsurance exchange, has been licensed by the Commonwealth of Pennsylvania to sell insurance in Pennsylvania since 1950. In April, 1983, a wholly-owned subsidiary of USAA was authorized by federal agencies to own and operate a federal savings bank located in San Antonio, Texas. As the owner of a federal savings bank, USAA became a savings and loan holding company.

2. On July 3 and August 27, 1984, the Pennsylvania Insurance Department notified USAA that, pursuant

to Section 641 of the Pennsylvania Insurance Department Act of 1921, as amended, it must divest the savings bank or risk revocation of its authority to sell insurance in Pennsylvania. Section 641(b) provides, in part, that "[n]o . . . savings and loan holding company or any affiliate thereof, may, directly or indirectly, be licensed or admitted as an insurer or be licensed to sell insurance in this state" except in circumstances not relevant to this case. On October 29, 1984, USAA disputed the suggestion that Section 641 prohibits its ownership of a savings bank. Relying on other sub-sections of the statute, USAA contended that Section 641 bars only the affiliation of an insurer with a bank that is doing business in Pennsylvania and USAA represented that its savings bank did not conduct business in Pennsylvania.

3. On November 27, 1984, USAA and three of its subsidiary insurance companies filed an action in the United States District Court for the Middle District of Pennsylvania seeking declaratory and injunctive relief to prevent the Insurance Department from basing enforcement action on Section 641. USAA alleged that application of Section 641 to it would violate the Commerce Clause, the Supremacy Clause and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

4. On December 24, 1984, the Insurance Department issued an Order to Show Cause that directed USAA to appear at an administrative hearing that would determine the applicability of Section 641. On the same day, the Insurance Department requested that the district court abstain from considering any of USAA's constitutional claims.

5. On September 30, 1985, the district court ruled for three reasons that abstention would be proper. *First*, the district court applied the doctrine of *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941). It concluded that the scope of Section 641 is an unsettled question of law and that resolution of the statutory question might obviate the need for adjudication of USAA's constitutional claims. The district court rejected the assertion that USAA would suffer untoward harm if state administrative proceedings were permitted to go forward because state "procedures will assure U.S.A.A. that, before its license is revoked and it is prohibited from doing business in Pennsylvania, it will have the opportunity to be heard on both the state law issue and the constitutional challenges" in the Pennsylvania state courts. Pet. App. at 19a-20a.

Second, the district court held that abstention was proper under *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), which is applicable where a federal court faces difficult questions of state law bearing on important state issues. Pet. App. at 23a-24a. The district court held that the standards of *Burford* were satisfied because "the policies behind § 641 and designed to be implemented by § 641 may have everything to do with the relationship between insurers and insured," *id.*, at 28a, and because enactment of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015, demonstrates the federal policy that " 'regulation of the insurance industry be left to the individual states.' " *Id.*, at 25a, quoting *Levy v. Lewis*, 635 F.2d 960, 963 (2d Cir. 1980).

Third, the district court concluded that the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), required

abstention. The district court interpreted the *Younger* doctrine to apply to circumstances " 'where federal intervention into state administrative proceedings would be substantial and disruptive, and where the state proceedings are adequate to vindicate federal claims and reflect strong and compelling state interests.' " *Id.*, at 31a, quoting *Williams v. The Red Bank Board of Education*, 662 F.2d 1008, 1017 (3d Cir. 1981). In the district court's view, the *Younger* doctrine was applicable because (i) no proceedings of substance had taken place in federal court on the merits of USAA's constitutional claims, *id.*, at 32a-33a, (ii) the state had a weighty interest in pursuing the administrative proceeding, *id.*, at 34a-35a, and (iii) the state court system was available to review any administrative decision adverse to USAA and to consider any of USAA's federal constitutional claims. *Id.*, at 35a-36a.

6. On June 6, 1986, the United States Court of Appeals for the Third Circuit reversed each of the district court's holdings. The court held that *Pullman* abstention was inappropriate because (i) a state decision to revoke USAA's license, even if stayed, might cause USAA serious financial harm, and (ii) claims that a state law is preempted by federal law "are not substantial federal constitutional issues for which *Pullman* abstention might be appropriate," *United States Automobile Ass'n v. Muir*, 792 F.2d 356, 364 (3d Cir. 1986). The court refused to apply *Burford* because, in its view, (i) Section 641 does not involve the "business of insurance" under the McCarran-Ferguson Act, 15 U.S.C. § 1012, and (ii) the regulatory scheme involved is not complicated. Finally, the court rejected the district court's application of the *Younger*

doctrine because the Insurance Commissioner would not, under state law, be permitted to pass upon the validity of USAA's federal constitutional claims.

In a separate concurrence, Judge Becker disagreed with one aspect of the court's *Pullman* reasoning. In his view, USAA had not shown that the injury it would likely suffer from abstention was so great as to require immediate federal consideration of its constitutional claims.

7. On October 3, 1986, pursuant to an extension of time granted by this Court, the petitioner, the Insurance Commissioner of the Commonwealth of Pennsylvania, timely filed a petition for a writ of certiorari. On October 23, 1986, this Court granted a motion extending until December 3, 1986, the time in which a response to the petition for certiorari must be filed. Pursuant to Rule 36.1 of the Rules of the Court, the latter extension of time permits this *amicus* brief to be filed on or before December 3, 1986.

SUMMARY OF ARGUMENT

The *Younger* doctrine, first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), requires federal courts to abstain from jurisdiction where federal claims can be presented in on-going state judicial proceedings that affect important state interests. The Third Circuit refused to apply *Younger* to this case on the sole ground that the state Insurance Commissioner is not empowered to decide federal constitutional claims in an administrative proceeding. This Court's subsequent decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ___U.S. ___, 106 S.Ct. 2718 (1986), establishes, however, that *Younger* is fully applicable where, as here, a state agency is permitted to con-

strue its statutory mandate in light of federal constitutional concerns and where federal constitutional claims may be presented to state courts that review the state administrative decision. Accordingly, the Court may wish to grant certiorari, vacate the lower court decision, and remand for reconsideration in light of the *Dayton Christian Schools* decision. Alternatively, the court of appeals decision may be reversed summarily.

For independent reasons, plenary review of the Third Circuit decision would also be appropriate. At least 24 states and territories have statutes that, like the Pennsylvania statute in controversy, limit the ability of lending institutions to sell insurance. These laws represent judgments of local legislatures that consumer interests would be best protected if banking customers are not subject to possible coercion arising from the dual marketing of financial and insurance products. But the ability of states to apply their legislative policy to specific factual circumstances will be needlessly hampered if the Third Circuit's decision is left intact. Fundamental principles of federalism require the conclusion that a federal court should abstain from the exercise of jurisdiction where, as here, a state would be denied the first opportunity to interpret the reach of a regulatory statute, where the subject-matter of regulation (the sale of insurance) has traditionally been left to the states, and where an interpretation of state law in favor of the regulated entity would eliminate the need for constitutional adjudication of any kind.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION FOR CERTIORARI, VACATE THE LOWER COURT DECISION, AND REMAND THIS CASE TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

This case presents an obvious circumstance in which certiorari should be granted, the decision below vacated, and the case remanded to the Third Circuit for consideration in light of an intervening decision of this Court. Here, the Court's recent decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, ___U.S. ___, 106 S.Ct. 2718 (1986), demonstrates conclusively that the lower court erred by refusing to abstain from the exercise of federal jurisdiction.

In *Younger v. Harris*, 401 U.S. 37 (1971), this Court established that "interests of comity and federalism counsel federal courts to abstain from jurisdiction whenever federal claims have been or could be presented in ongoing state judicial proceedings that concern important state interests." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 237 (1984). The Third Circuit refused to apply *Younger* abstention, however, on the sole ground that the on-going administrative hearing before the state insurance commissioner was not a judicial proceeding. *United Services Automobile Ass'n v. Muir*, 792 F.2d 356, 365 (3d Cir. 1986). In the court's view, a state administrative proceeding is part of its judicial process, for *Younger* purposes, "only if it provides an adequate opportunity to raise constitutional challenges." *Id.* at 365. Because "the insurance department in its administrative proceedings cannot consider USAA's con-

stitutional arguments, its administrative proceedings are not part of Pennsylvania's judicial process." *Id.*, at 366.

On June 27, 1986 -- twenty-one days after the Third Circuit's decision -- this Court repudiated the lower court's reasoning. *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., supra*, concerned a claim of sex discrimination filed with a state civil rights commission by a school teacher who asserted that her employer had unlawfully terminated her employment. On First Amendment grounds, the school, which was operated as a religious academy, sought a federal-court injunction barring the state administrative proceeding.

This Court held that the *Younger* doctrine required the federal courts to abstain from considering the school's constitutional claim. In so holding, the Court rejected as insufficient the school's assertion that *Younger* was inapplicable because "the administrative proceedings do not afford the opportunity to level constitutional challenges against the potential sanctions for the alleged sex discrimination." 106 S.Ct. at 2724. *First*, the Court recognized that state administrative agencies asked to interpret the reach of state statutes may consider the implications of federal constitutional doctrine even if they cannot render a decision on the merits of the federal constitutional claims. As the Court explained, "it would seem an unusual doctrine, and one not supported by the cited [state] case, to say that the Commission could not construe its own statutory mandate in the light of federal constitutional principles." *Id. Second*, the Court emphasized that state administrative processes cannot be disconnected artificially from the state ju-

dicial proceedings that follow on their heels. In other words, "it is sufficient . . . that constitutional claims may be raised in state court judicial review of the administrative proceeding." *Id.*

Both parts of the Court's reasoning are satisfied in this case. The state administrative proceeding is designed precisely to determine whether Section 641 of the Pennsylvania Insurance Department Act of 1921, as amended, is applicable to insurers that, like USAA, own banking institutions located outside the borders of Pennsylvania. In its administrative papers, USAA has expressly presented its multiple federal constitutional contentions and has argued that the Insurance Commissioner must "consider the constitutionality of Section 641 as applied to USAA, and . . adopt the construction that supports it's [sic] constitutionality." Respondents' Post-Hearing Brief at 19, *In Re: United Services Automobile Ass'n, et al.*, No. C84-12-5 ("Respondents' Post-Hearing Brief"). The Insurance Department has responded to USAA's argument by vigorously defending Section 641 on federal constitutional grounds. *See* Reply Brief of the Insurance Department, *In Re: United Services Automobile Ass'n, et al.*, No. C84-12-5 ("Insurance Department Reply Brief"). The Insurance Commissioner is well positioned, therefore, to "construe [his] own statutory mandate in the light of federal constitutional principles." *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, 106 S.Ct. at 2724.

In addition, USAA's constitutional contentions may be presented to the Commonwealth Court or subsequently to the Pennsylvania Supreme Court on review of the Insurance Commissioner's application of Section 641. In the event that the Insurance Commis-

sioner revokes or suspends USAA's license, USAA has an absolute right to judicial review, *see* 2 Pa.Cons.Stat. §§ 724, 763, which includes review of its federal constitutional claims by the state courts. *See* 2 Pa.Cons.Stat. §§ 703(a), 704. In addition, USAA would be free to appeal an adverse state-court decision to this Court. *See* 28 U.S.C. § 1257(2). Both of the bases of this Court's application of *Younger* in the *Dayton Christian Schools* case have, therefore, been met here.[1]

In sum, this Court's decision in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.* removes the sole basis for the lower court's legal conclusion that the *Younger* doctrine is inapplicable. Summary reversal of the Third Circuit decision would, there-

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[1] In his petition for certiorari, the Insurance Commissioner does not take issue with the lower court's understanding that, under Pennsylvania law, administrative agencies cannot rule that a statute violates the federal constitution. Nonetheless, it should be noted that USAA has consistently been permitted to present its federal constitutional claims to the Insurance Commissioner. Thus, USAA has argued in the regulatory proceeding that Section 641, if applied to its activities, would violate the Supremacy Clause, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and the Commerce Clause. *See* Respondents' Pre-Hearing Memorandum, Exhibit B (Statement of Legal Issues in Dispute), *In Re: United Services Automobile Ass'n*, No. C84-12-5; Respondents' Post-Hearing Brief at 20-32. The Insurance Department has responded in that forum by defending "the constitutionality of Section 641 and the Department's enforcement action." Insurance Department Reply Brief at 2; *see id.*, at 2-17. Even if the Insurance Commissioner is not permitted to decide the merits of the federal constitutional claims, the extensive briefing of those issues prior to the entry of an enforcement order will assist any court that is subsequently required to review the constitutionality of the Insurance Commissioner's actions.

fore, be appropriate. *See, e.g., Wyrick v. Fields*, 459 U.S. 42 (1982) (*per curiam*); *id.*, at 50 (Marshall, J., dissenting) (Summary reversal "should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.") (footnote omitted). Because the lower court decision pre-dates the *Dayton Christian Schools* decision, however, this Court may wish instead to grant, vacate, and remand for further consideration in light of that decision.

II. THIS CASE PRESENTS IMPORTANT INTERESTS OF FEDERALISM THAT REQUIRE PLENARY HEARING AND DECISION BY THIS COURT

The Third Circuit's conclusion that the merits of this case should be considered by a federal court rests on two separate strands of the abstention doctrine. The Third Circuit held that the facts of this case fail to satisfy either the rule of *Younger v. Harris*, 401 U.S. 37 (1971), or the standards for the invocation of equitable abstention established in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), and *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

These abstention doctrines rest on the same basic principles of federalism. A federal court that considers important and unsettled questions of state law must take care not to nullify the state's role in interpreting and enforcing its own legislative policies. Abstention doctrines serve the interests of federalism by recognizing that "the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. at 44. Considerations of federalism

therefore counsel the federal courts to avoid "needless friction with state policies." *Railroad Comm'n v. Pullman Co.*, 312 U.S. at 500-01; *see Burford v. Sun Oil Co.*, 319 U.S. at 332-33.

This case is important precisely because the lower court decision unnecessarily displaces state authority and state discretion. The Third Circuit opinion disregards the teachings of this Court -- and the basic tenets of federalism -- by taking from the Commonwealth of Pennsylvania the first opportunity to interpret the reach of a statute, the scope of which is at issue in an ongoing administrative proceeding, the subject-matter of which is an industry traditionally regulated by the states, and the resolution of which may moot the need for the consideration of federal constitutional issues by any court, state or federal.

The potential effect of the lower court decision is not confined, however, to a single state. At least twenty-four other states or territories limit in some manner the ability of lending institutions to sell insurance.[2] Those statutes represent a broad consensus on the state level that the public interest will be best served if banking and similar institutions do not also engage in unrestricted insurance activities.[3] Applica-

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[2] *See* Appendix (Relevant Excerpts From State Codes).

[3] *See, e.g.*, Ark. Stat. Ann. § 66-2810(2)(e) (authorizing the Insurance Commissioner to promulgate regulations "in order to effectuate the purposes of this section, which are to help maintain the separation between lending institutions and the insurance business and to minimize the possibilities of unfair competitive and deceptive practices by lending institutions or their subsidiaries or affiliates affecting agents, brokers or the public."); Colo. Rev. Stat. § 10-2-221(5) (authorizing the commissioner to promulgate "such regulations as are necessary to

tion of the lower-court decision in this case, however, would deprive each of those states of the initial opportunity to interpret the scope of their statutes because any insurer subject to possible regulation would be able to displace state authority merely by proceeding to federal court to seek an injunction. Such disruption of the state's ability to refine its laws through application of statutory requirements to specific circumstances is inconsistent with our federal system and is worthy of this Court's attention.

The importance of the Third Circuit's decision is not confined, however, to the impact of its ruling on states across the nation. Its interpretation of the abstention doctrine raises three separate issues, each of which deserves plenary decision by this Court. *First*, and as explained above, the Third Circuit's application of the *Younger* doctrine is in direct conflict with this Court's ruling in *Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc.*, *supra*.

Second, the Third Circuit's application of *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), is in direct conflict with the holdings of other courts of appeal. The *Pullman* doctrine instructs federal courts to "abstain from decision when difficult and unsettled questions of state law must be resolved be-

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maintain the separation between banks or bank holding companies and the insurance business and to promote fair trade practices."); Ga. Code Ann. § 33-3-23 (1986) (authorizing the Commissioner of Insurance "to promulgate rules and regulations in order to effectuate the purposes of this Code section, which are to assist in the maintenance of the separation between lending institutions and the insurance business and to minimize the possibilities of unfair competitive practices by lending institutions, agents and brokers.").

fore a substantial federal constitutional question can be decided." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984). The Third Circuit ruled that USAA's motion for summary judgment did not raise a "substantial federal question" because "preemption problems are resolved through a nonconstitutional process of statutory construction." 792 F.2d at 363.[4]

The federal circuit courts are deeply divided on the issue of whether a preemption claim is subject to the *Pullman* doctrine. The cases can be classified into three distinct categories: (i) The Third Circuit, in the decision below, and the Ninth Circuit, *see Knudsen Corp. v. Nevada State Diary Comm'n*, 676 F.2d 374 (9th Cir. 1982), have held that, in all circumstances, preemption claims are not subject to equitable abstention, (ii) The First Circuit has applied *Pullman* abstention to a complaint filed in federal court that raised only a preemption claim, without any suggestion that preemption claims might ever be exempt from abstention, *Druker v. Sullivan*, 458 F.2d 1272 (1st Cir. 1972), and (iii) The Fourth Circuit has held that federal courts may abstain from consideration of preemption claims, while suggesting that "abstention is inappropriate where the federal government has

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[4] The lower court recognized that USAA had raised other constitutional claims in its complaint, but decided the *Pullman* issue without reference to those claims because the preemption ground was the sole basis for a motion for summary judgment filed by USAA. *Id.*, at 364. The *amici* know of no support for the proposition that application of the abstention doctrines should depend on a plaintiff's choice of which constitutional issues to present for summary judgment and which to hold back for future consideration by a district court. The Third Circuit's ruling would permit obvious, and inappropriate, manipulation of a federal court's application of abstention doctrines.

preempted the field . . . or where there is a direct, facial conflict between state and federal statutes. . . ." *Aluminum Co. v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1030 (4th Cir. 1983), *cert. denied*, 465 U.S. 1052 (1984).

This conflict between the circuits raises an important issue about the nature of preemption claims and the purpose of the abstention doctrine. The Third Circuit distinguished claims under the Supremacy Clause from other constitutional claims on the ground that preemption analysis only requires application of the "nonconstitutional process of statutory construction." 792 F.2d at 363. But, in fact, preemption analysis demands much more. As this Court has explained, a claim under the Supremacy Clause requires a court to consider (i) whether "Congress evidences an intent to occupy a given field," or (ii) whether state regulation "actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or [when] the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress . . . ." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). In essence, therefore, a federal court is required to survey carefully both federal and state law, to discover the purpose behind federal regulation, and to determine whether state policy has been displaced, even implicitly, by federal action.

The resemblance between this analysis and principles of abstention is obvious. Both doctrines insure " 'scrupulous regard for the rightful independence of state governments,' " *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. at 501, quoting *Di Giovanni v. Camden Ins. Ass'n*, 296 U.S. 64, 73 (1935), while

recognizing the need for the decision-making process of federal institutions to take precedence in appropriate circumstances. This Court should resolve the conflict among the circuits by holding that challenges to state law based on the Supremacy Clause are exactly the type of controversies to which *Pullman* abstention may be correctly applied.[5]

Third, the Third Circuit's application of the equitable abstention doctrine as applied by this Court in *Burford v. Sun Oil Co.*, *supra*, raises an important question concerning the extent to which Congress has permitted the states to regulate the business of insurance.[6] The *Burford* decision is appropriately applied by federal courts to abstain where necessary to avoid needless conflict with a state regulatory scheme

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[5] Another aspect of the Third Circuit's *Pullman* analysis also presents a question worthy of the Court's attention. The lower court held that USAA would be unfairly harmed if the state proceeding went forward, even if any license suspension or revocation were stayed pending judicial review. 792 F.2d at 362-63. But the so-called harms identified by that court would have "no legal force or practical effect upon [USAA's] business other than the disruptions that accompany any major litigation." *FTC v. Standard Oil Co.*, 449 U.S. 232, 243 (1980). The Third Circuit's analysis would, therefore, preclude application of *Pullman* in virtually any case in which a for-profit corporation challenges the constitutionality of state enforcement action.

[6] The questions presented by the petitioner in his petition for certiorari refer only to the *Younger* and *Pullman* cases. The *Burford* question is, nonetheless, a "subsidiary question" that is "fairly included" in the questions presented. Supreme Court Rule 21.1(a). As the *Burford* Court itself recognized, its exercise of equitable discretion was based squarely on the earlier decision in *Pullman*. *See* 319 U.S. at 331-33. Thus, *Burford* simply represents one facet of the equitable abstention doctrine set forth in *Pullman*.

that serves important state concerns. *See Alabama Public Service Comm'n v. Southern Ry.*, 341 U.S. 341, 348-50 (1951). The Third Circuit devalued the importance of the state interest in regulating the business of insurance by concluding that Section 641 is not protected from federal regulation by the McCarran-Ferguson Act because restrictions on the sale of insurance by lending institutions do not regulate the "business of insurance." 15 U.S.C. § 1012.

This Court has recognized, however, that "the licensing of companies and their agents . . . [is] also within the scope of the statute." *SEC v. National Securities, Inc.*, 393 U.S 453, 460 (1969); *see also Robertson v. California*, 328 U.S. 440, 459 (1946). That conclusion follows from the fundamental purpose of McCarran-Ferguson: "to assure that the States are free to regulate insurance companies without fear of Commerce Clause attack." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n.18 (1979). The Third Circuit's decision flies in the face of congressional intent by depriving the state of the initial chance to determine whether, as USAA claims, Section 641 impermissibly burdens commerce. More importantly, the Third Circuit's construction of McCarran-Ferguson adversely affects the state's ability to contend (when the preemption question is reached) that its regulation is exempt from federal interference.

The import of the Third Circuit decision, therefore, is to obstruct the ability of the Commonwealth of Pennsylvania to regulate the permissible activities of insurance companies licensed to do business in that state. It thus hampers the ability of the state to pro-

tect consumers from undue economic concentration that results in higher prices and unfair selling tactics. But the effect of the Third Circuit's decision is much broader. Because, as noted above, at least twenty-four states and territories limit the ability of financial institutions to sell insurance, the lower court decision poses a major threat to the continuation of state regulation in many jurisdictions. For this reason, plenary review of the Third Circuit decision is warranted.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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APPENDIX

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RELEVANT EXCERPTS FROM STATE CODES

Arizona

Ariz. Rev. Stat. Ann. § 6-465(A)(1986)

> "An association operating under this chapter and any other association or corporation, under whatever laws organized, except an association or corporation operating an insurance business, other than title insurance . . . may merge into one association operating under this title."

Arkansas

Ark. Stat. Ann. § 66-2810(2) (1981 Supp.)

> "The Commissioner shall not issue any Agent's license to any lending institution, . . . in any municipality within this state which has a population that exceeds five thousand [5,000], according to the latest United States decennial census.
>
> (a) Provided, however, such lending institution, . . . may [*inter alia*] be issued a license:
>
> (i) to sell mortgagor's decreasing term life insurance, mortgagor's accident, health and sickness insurance, credit life insurance, credit accident and credit health and accident insurance."

California

42A Cal. Ins. Code § 1643 (West 1986)

> "No bank, [and] no bank holding company . . . may be licensed as an insurance agent or broker or act as an agent or broker for insurance . . ., except that a bank or a bank holding company subsidiary, or affiliate of a bank may be issued a license to act as a life and disability agent limited to the transaction of credit life and disability insurance . . . This section shall not apply [*inter alia*] to any bank or bank holding company which, under the authorization of the Federal Reserve Board, had prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance (except that subsequent authorization to expand such activities shall be subject to this section), or to any bank holding company owning a state-chartered bank which had, prior to January 1, 1976, a subsidiary or affiliate licensed to sell insurance."

Cal. Fin. Code § 1208 (West 1968)

> "A commercial bank located in a place the population of which does not exceed 5,000 persons . . . may act as agent for fire, life, or other insurance company authorized to do business in California . . . "

Colorado	Colo. Rev. Stat. § 10-2-221(2) (1983) "No bank or bank holding company, nor any subsidiary, affiliate, or employee thereof, shall be licensed or admitted, directly or indirectly, as an insurer or be licensed to sell insurance in this State . . . , except that [*inter alia*]: (a) A bank or a bank holding company . . . may be licensed to sell credit life and credit accident and health insurance . . . (b) A bank holding company . . . , in a municipality or trade area, the population of which does not exceed five thousand . . . may be licensed to sell insurance . . . (c) Any employee of a bank or bank holding company licensed to sell insurance . . . on July 1, 1977, may continue to do so . . ." § 11-6-101(2) (1983) "[A]ny bank, located and doing business in any community the population of which does not exceed five thousand inhabitants, . . . may, . . . act as the agent for any fire, life, or other insurance company . . ."

Connecticut	Conn. Gen. Stat. Ann. § 38-72a (West 1986) "(b) No license authorizing the sale of fire and casualty insurance shall be issued . . . to (1) a lending institution, or (2) a bank holding company . . . [except for licenses issued as of October 1, 1973]"
Florida	Fla. Stat. Ann. § 626.988(1)(a) (West 1984) "This definition [of financial institution] shall not . . . include [*inter alia*] any financial institution which has been granted an exemption by the Board of Governors . . . pursuant to § 4(d) of the Federal Bank Holding Company Act . . . . Specifically excluded [from this prohibition] . . . is any bank which is not a subsidiary or affiliate of a bank holding company and is located in a city having a population of less than 5,000 . . ." § 626.988(2) (West 1984) "No insurance agent . . . licensed by the department of insurance . . . who is associated with, . . . a financial institution shall engage in insurance agency activities as an employee . . . of a financial institution agency" [with certain exceptions set forth in the statute].

§ 626.988(2)(a) (West 1984)
"[A]n insurance agent . . . who is affiliated with . . . a bank holding company subsidiary, . . . may engage in insurance activities . . ., but only to the extent that such activities are directly related to extensions of credit . . . [S]uch agent may offer decreasing term life insurance."

Georgia

Ga. Code Ann. § 33-3-23 (1986)
"(b) No lending institution [or] bank holding company, . . . may directly or indirectly be licensed to sell insurance in any municipality within this state which has a population which exceeds 5,000 . . . except that [*inter alia*] a lending institution . . . may engage in underwriting . . . credit life insurance and credit accident and sickness insurance . . ."
"(f) [and statutory restrictions] . . . shall [not] apply to any lending institution . . . which was a subsidiary or affiliate of either of the foregoing on January 1, 1974 . . ."

Iowa

Iowa Code Ann. § 524.710 (West 1970)
"No officer or employee of a state bank shall: . . . (3) [e]ngage, directly or indirectly, in the sale of any kind of insurance . . ."

Kentucky	Ky. Rev. Stat. Ann. § 287.030(4) (Michie 1986) "No person who after July 13, 1984, owns or acquires more than one-half (1/2) of the capital stock of a bank shall act as insurance agent or broker with respect to any insurance except [*inter alia*] credit life insurance [and] credit health insurance . . ."
Louisiana	La. Rev. Stat. Ann. § 22:1454 (West 1978) "No domestic insurer shall . . . engage in any banking business whatsoever."
Maine	Me. Rev. Stat. Ann. tit. 24-A, § 1514-A(2)(1983) "No financial institution . . . may be licensed as an insurance agent. . . . [with exceptions noted in the statute]."
Massachusetts	Mass. Gen. Laws Ann. Ch. 175, § 174E (West 1986) "No such [insurance] license . . . shall be issued to any bank unless such bank held such license . . . prior to October eleventh, nineteen hundred and seventy-two. . . ."

Mississippi	Miss. Code Ann. § 83-17-229 (1986) "No lending institution . . . or holding company located in any municipal corporation of this state which has a population of seven thousand (7,000) persons or more . . . may directly or indirectly be licensed to sell insurance . . ., however, . . . the subsidiary or affiliate of a lending institution . . . may be licensed to sell credit life, health and accident insurance . . ."
Nebraska	Neb. Rev. Stat. § 44-392 (1986) "It shall be hereafter unlawful for any bank . . . located in any incorporated city in this state having a population of two hundred thousand or over, to sell, write or solicit any kind or form of insurance . . ."
Nevada	Nev. Rev. Stat. Ann. § 662.235(2) (Michie 1971) "No bank shall act as agent for any insurance company." § 683A.110(2)(1971) "No bank or bank holding company . . . may directly or indirectly be licensed to sell insurance in this state except as to credit life and health insurance and credit property insurance . . ."

New Hampshire

N.H. Rev. Stat. Ann. § 384:16-b(II) (1983)

> "[N]o bank or banking association . . . shall directly or indirectly engage in . . . the sale or servicing of policies of property or casualty insurance . . .; insurance consulting activities or performance of any other activity as insurance agents or brokers . . ."

New York

N.Y. Ins. Law § 2501 (McKinney 1985)

> "(a) No insurance agent or broker . . . who is owned or controlled, directly or indirectly, by a bank shall negotiate any policy of insurance covering real or personal property which is the subject matter of, or security for, a loan or extension of credit made by the bank . . ."

Ohio

Ohio Rev. Code Ann. § 3911.01 (Anderson 1985)

> "The business of life insurance, or life and accident insurance, in this state, shall not be in any way transacted by any company, partnership or association which in this state, or in any other state or country, . . . does a banking or any other kind of business in connection with insurance."

Puerto Rico	P.R. Laws Ann. tit. 26 § 304 (1985) "To qualify . . . to transact insurance in Puerto Rico an insurer must: (7) [c]omply with the following additional qualification []: (a) [t]hat no bank, . . . except companies engaged exclusively in the financing of individual insurance premiums . . . [can] own or control a substantial part of the shares of the insurer."
	§ 307 "No person shall be authorized as an insurer in Puerto Rico if he engages in any business other than the insurance business . . ."
Rhode Island	R.I. Gen. Laws § 27-3-47 (1979) "Except for [*inter alia*] the sale of credit life insurance [and] credit accident and health insurance . . . no license to act as an [insurance] agent . . . shall be issued to . . . a bank, savings bank or trust company . . . a bank holding company [or] any other individual, corporation, partnership or association authorized to take deposits and to make loans of money. . . ."

Tennessee	Tenn. Code Ann. § 56-6-201 (1986) "(a) No insurance agent . . . who is owned or controlled directly or indirectly or who is employed by a bank holding company . . . shall negotiate any policy of insurance other than [*inter alia*] credit life insurance [and] credit accident and health insurance . . ."
Texas	Tex. Ins. Code, Art. 21.07-3, Sec. 5(h) (1981) "Except as provided herein, [an insurance] licensee that qualifies under this section may not be owned in whole or in part, either directly or indirectly, by a state bank, national bank, or bank holding company. . . . This subsection shall not apply to any licensee that on June 1, 1981, is owned by a state bank, national bank, or bank holding company . . .

so long as ownership continues; nor shall this subsection apply to a licensee for which on July 15, 1981, a state bank, national bank, or bank holding company . . . filed an application for prior approval of ownership . . ."

Vermont

Vt. Stat. Ann. tit. 8, § 4811 (1984)
"(a) No lending institution may directly sell, negotiate or service insurance in this state, except [*inter alia*] credit or mortgage life insurance . . ."

Virginia

Va. Code Ann. § 38.2-205 (1986)
"A. No lending institution, [or] bank holding company . . . doing business in this Commonwealth, or any officer or employee, excluding a director of any of these institutions, shall be directly or indirectly licensed to sell insurance if located in any county, city or town in this Commonwealth that has a population exceeding 5,000 persons . . ."

"C. Nothing in this section shall apply to (i) any lending institution . . . licensed to sell insurance . . . on January 1, 1977 . . ."